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Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

JOSE CRESPO,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The questions presented by this petition are:

1. Does the formulation of the "exigent circumstances" exception to the warrant requirement of the Fourth Amendment, as enunciated in *Dorman v. United States*, 435 F.2d 385 (D.C.Cir. 1970), and applied in this case, survive the Court's condemnation of warrantless home arrests in *Payton v. New York*, 445 U.S. 573 (1980)?

2. Was Mr. Crespo's purported "consent" to search his apartment the tainted fruit of violations of the rule enunciated in *Payton v. New York, supra,* and was it otherwise freely and voluntarily given?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
I.	
STATEMENT OF THE CASE	3
II.	
STATEMENT OF FACTS	4
III.	
REASONS FOR GRANTING WRIT	12
CONCLUSION	27
APPENDIX	
APPENDIX A. Transcript of Trial, United States District Court, Eastern District of New York, Hon. Jack B. Weinstein, Judge Presiding, Dated December 1, 1986	A-1
APPENDIX B. Opinion of the Court, United States Court of Appeals, for the Second Circuit, *United States of America v. Jose Crespo,* 834 F.2d 267 (2d Cir. 1987)	B-1
APPENDIX C. Title 18, U.S.C. section 1512	C-1

TABLE OF AUTHORITIES

Cases

	Page
Brown v. Illinois, 412 U.S. 590 (1975)	24, 25
Coolidge v. New Hampshire, 403 U.S. 347 (1967)	12
Dorman v. United States, 435 F.2d 385 (1970)	i, 17, 18, 19
Florida v. Royer, 460 U.S. 491 (1983)	24, 25
Katz v. United States, 389 U.S. 347 (1967)	13, 14
Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985)	19
McKinney v. George, 726 F.2d 1183 (9th Cir. 1984)	16
Mincey v. Arizona, 437 U.S. 385 (1978)	21
Niro v. United States, 388 F.2d 535 (1st Cir. 1968)	22
Payton v. New York, 445 U.S. 573 (1980)	i, 3, 12, 13, 14, 15, 20, 23, 24
People v. Oliver, 417 Mich. 366, 338 N.W. 2d 167 (1983)	15
Rakas v. Illinois, 439 U.S. 128 (1978)	13
State v. Hardin, 359 N.W. 2d 185 (Iowa 1984)	19
State v. Hert, 220 Neb. 447, 370 N.W.2d 166 (1985)	19
State v. Holman, 103 Wash.2d 426, 693 P.2d 89 (1985)	15
State v. Morse, 125 N.H. 403, 480 A.2d 183 (1984)	12, 15, 16, 17
State v. Page, 277 N.W.2d 112 (N.D. 1979)	19
Thompson v. Louisiana, 105 S.Ct. 409 (1984)	21
United States v. Adams, 621 F.2d 41 (1st Cir. 1980)	18
United States v. Bell, 488 F.Supp. 371 (D.C.Dist. 1980)	22
United States v. Carriger, 541 F.2d 545 (6th Cir. 1976)	26

Table of Authorities

Cases

	Page
United States v. Case, 543 F.2d 766 (7th Cir. 1970)	26
United States of America v. Jose Crespo, 834 F.2d 267 (2d Cir. 1987)	1
United States v. Curran, 498 F.2d 30 (9th Cir. 1974)	22
United States v. Eisler, 567 F.2d 814 (8th Cir. 1977)	26
United States v. Fuker, 543 F.2d 709 (9th Cir. 1976)	26
United States v. Hare, 589 F.2d 1291 (6th Cir. 1979)	22
United States v. Holland, 755 F.2d 253 (2d Cir. 1985)	26
United States v. Lindsay, 506 F.2d 166 (D.C.Cir. 1974)	19
United States v. Martinez-Gonzalez, 686 F.2d 93 (2d Cir. 1982)	11, 12, 17, 18, 20
United States v. Mendenhall, 446 U.S. 544 (1980)	25
United States v. Morgon, 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985)	15
United States v. Perez-Esperaze, 609 F.2d 1284 (9th Cir. 1979)	24, 25
United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974)	22
United States v. Santana, 427 U.S. 38 (1976)	11, 14
United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984)	22
United States v. Scheffer, 463 F.2d 567 (5th Cir.), *cert. denied*, 409 U.S. 984 (1972)	22
United States v. Verrusio, 742 F.2d 1077 (7th Cir. 1984)	25
United States v. Watson, 433 U.S. 411 (1976)	13, 20

TABLE OF AUTHORITIES

CASES

Page

Welsh v. Wisconsin, 466 U.S. 740 (1984) 18

Wong Sun v. United States, 371 U.S. 471 (1963) .. 24

Rule

Federal Rules of Criminal Procedure

Rule 41 3

Statutes

United States Codes

Title 18, Section 1512 .....2, 21, 22

Title 18, Section 1512(a)(3) 3

Title 18, Section 3623 3

Title 28, Section 1254(1) 2

Constitution

United States Constitution

Fourth Amendment 2, 12, 14, 20

Other Authorities

Donnino & Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Albany L.Rev. 90 (1980) 19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, JOSE CRESPO, respectfully prays that a Writ of Certiorari issue to review the reported opinion of the United States Court of Appeals for the Second Circuit in the matter of *United States of America v. Jose Crespo,* 834 F.2d 267 (2d Cir. 1987), which affirmed the order of the United States District Court for the Eastern District of New York denying petitioner's motion to suppress evidence prior to trial.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in this matter is reported as hereinabove noted, and is set forth in the attached Appendix. (App. A). The District Court made specific findings of fact and law on the record, following final arguments by

both parties with respect to petitioner's motion to suppress. The transcript of those proceedings are also set forth in the attached Appendix. (App. A).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, U.S.C. Section 1254(1) on the ground that his rights under the Fourth Amendment to the United States Constitution were violated.

The instant petition for Writ of Certiorari is being filed within sixty days of an order and opinion of the United States Court of Appeals for the Second Circuit which affirmed the denial of petitioner's motion to suppress evidence prior to his criminal trial before the United States District Court for the Eastern District of New York.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 18, U.S.C. Section 1512 was invoked in part by both the trial court and the Court of Appeals in this matter as a basis for upholding the warrantless arrest of petitioner, and as it is lengthy, petitioner therefore sets forth that statute in full in the attached Appendix. (App. C).

I.

STATEMENT OF THE CASE

Petitioner, JOSE CRESPO and his brother Gerardo were jointly charged in a superseding indictment in the United States District Court for the Eastern District of New York. The indictment alleged a conspiracy between them to distribute cocaine; two counts of possession of cocaine with intent to distribute, once on February 7, 1986, and again on October 1, 1986; and two counts of intimidating and threatening a person to hinder and prevent communication with law enforcement officers in violation of Title 18, United States Code, section 1512(a)(3), once on July 17, 1986 and again on September 25, 1986. Prior to trial Mr. CRESPO noticed a motion to suppress all narcotic drugs seized from his apartment and/or his person on October 1, 1986, pursuant to Rule 41 of the Federal Rules of Criminal Procedure. The hearing on this motion was heard on November 24-26, 1986 before the Honorable Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York. Subsequent to the hearing on Mr. CRESPO's motion to suppress, both Mr. CRESPO and the Government filed memorandums in the trial court in support of their positions. Mr. CRESPO argued that his purported "consent" to search his apartment was not freely and voluntarily given, but the product of police coercion and submission to authority. He further argued that his arrest was not valid under the dictates of *Payton v. New York,* 445 U.S. 573 (1980). The Government argued first that the version of the events testified to by JOSE CRESPO and his common law wife, Diana Jiminez were not believable; next, the Government argued that exigent circumstances existed in this case to excuse the requirement of obtaining a warrant; and, finally, that JOSE CRESPO and Diana Jiminez freely and voluntarily consented to the

search of their apartment. On December 1, 1986, the Court heard final argument from both parties with respect to Mr. CRESPO's motion to suppress. The trial court made specific findings of fact and law on the record, and denied Mr. CRESPO's motion in total. (App. B, *infra*).

Jury trial in this matter commenced on March 9, 1987, and concluded with jury verdicts on March 11, 1987. JOSE CRESPO's brother and co-defendant was found not guilty of all charges. JOSE CRESPO was found not guilty on Count II of the superseding indictment (alleging possession of cocaine with intent to distribute on February 7, 1986), but was found guilty as charged on the remaining counts.

On the date set for sentencing Mr. CRESPO renewed his pretrial motion to suppress, citing the trial testimony of Gerardo Crespo's wife to the effect that a pattern of police abuse was shown, and also, offering to the court the medical records obtained by subpoena from the Metropolitan Correctional Center, which substantiated Mr. CRESPO's claim that the officers injured him on the day of his arrest. The trial court did not credit these two items of evidence, and denied Mr. CRESPO's renewed motion to suppress. Mr. CRESPO was sentenced to ten-year terms of incarceration on each count of conviction, the sentences to run concurrently with one another, and Mr. CRESPO is currently serving that sentence.

II.

STATEMENT OF FACTS

At the pretrial hearing on Mr. CRESPO's motion to suppress evidence, Special Agent Hunt of the Drug Enforcement Administration (hereinafter "DEA"), testified that in February of 1986, a paid Government informer,

one Maria Polkowski, stated to him that a person named "Jose" was a major narcotics dealer, and that she had arranged with "Jose" to purchase three kilograms of cocaine for $100,000. (P.T. 7)[1] Agent Hunt instructed Ms. Polkowski to go forward with the planned meeting with Jose at her home, but to delay the deal by telling "Jose" that she did not have the money for the purchase. DEA officers surveilling Ms. Polkowski's home planned to arrest "Jose" as he left with the cocaine. (P.T. 8). Agent Hunt testified that he made no arrest on February 7, 1986 of the person he believed to be "Jose", because of a false radio transmission which indicated that the person he suspected did not have any cocaine in his possession. (P.T. 9). Agent Hunt broke off surveillance of this person, but afterwards was allegedly told by Ms. Polkowski that this person did have three kilograms of cocaine in his possession, was armed, and had threatened her life because the cocaine purchase was not consummated. (P.T. 10).

In July of 1986 Ms. Polkowski told Agent Hunt that "Jose" and his brother had come to her home, that "Jose" threatened her at gunpoint, and told her that he would kill Ms. Polkowski and her children because, according to Ms. Polkowski, "Jose" had learned that she was working as a Government informant. "Jose" allegedly told Ms. Polkowski that if he was arrested as a result of the February transaction, his "men" would kill her and her children. (P.T. 10).

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[1] "P.T." refers to the Court Reporter's Pretrial Transcript of the Hearing on Mr. CRESPO's motion to suppress, heard on November 24, 1986 through November 26, 1986, and consisting of 109 pages. Hereinafter "T.T." refers to the Reporter's Trial Transcript, consisting of 411 pages. The only other transcript referred to hereinafter will be the transcript of argument and ruling on the motion to suppress, which is set forth in App. B, *infra*.

The agents allege that Ms. Polkowski did not know "Jose's" last name or where he lived at the time, but Agent Hunt told Ms. Polkowski to check with her sources and see if she could learn of "Jose's" last name or where he lived. In late September, 1986 Ms. Polkowski allegedly informed Agent Hunt that "Jose" lived somewhere on the second floor of an apartment building located at 85-05 35th Avenue in Queens, New York. She also allegedly told Agent Hunt that she had gone to the location, and had talked to people there in an attempt to find "Jose". (P.T. 10-11). She then informed Agent Hunt that the day following her visit to the 35th Avenue apartment, "Jose" and his brother returned to her home with a sawed-off shotgun and threatened to kill her if she continued to bother them. (P.T. 11).

At approximately 6:00 p.m. on October 1, 1986, DEA Agents Hunt, Garcia, Geisel and Grabowski accompanied Ms. Polkowski to the 35th Avenue apartment, purportedly to either interview "Jose" or arrest him. Their plan, as instructed to Ms. Polkowski, was to have her knock on all of the doors on the second floor, and if "Jose" answered the door, she was to ask him why he had been threatening her. In the meantime the agents would hide out-of-sight behind a stairwell, approximately twenty-five to thirty feet away. (P.T. 11-12, 29-30, 48). The agents, along with Ms. Polkowski, entered the locked apartment building by either buzzing a resident, who let them in, or entered while someone else went into the building. (P.T. 31, 65).

Ms. Polkowski knocked on two doors without success. JOSE CRESPO opened the third door about halfway and began speaking with Ms. Polkowski. Their conversation was primarily in Spanish. Ms. Polkowski asked JOSE CRESPO why he was threatening her. Agent Garcia, who speaks and understands Spanish fluently, understood part of the conversation. Agent Garcia testified that he

heard JOSE CRESPO use the word "killers", and also say, "I have nothing to do with you, but my people will deal with you." (P.T. 49, T.T. 233). Agent Hunt testified that he later learned from Agent Garcia that JOSE CRESPO's response was, "Stay away from me. I have nothing to do with you, my people will deal with you." (P.T. 12-13).

At this point Agents Hunt, Garcia, and Geisel emerged from the stairwell, approached JOSE CRESPO's door, and identified themselves in loud voices that they were police officers. (P.T. 49). The other agent was stationed outside of the apartment building to prevent any escape attempt by Mr. CRESPO. (P.T. 17). According to Agents Hunt and Garcia, none of the officers unholstered their weapons, but both admitted that they placed their hands upon weapons to have them ready for use. (P.T. 6, 28). The trial court made a specific finding that the officers' weapons were visible to JOSE CRESPO and Diana Jiminez, his common law wife, who lived with JOSE CRESPO at the location. (App. B, *infra*). JOSE CRESPO looked at the officers in a startled manner and closed his apartment door as the agents approached him. (P.T. 14). JOSE CRESPO remained inside his apartment, and it was at this time that Agent Hunt testified that he formed the intention to arrest JOSE CRESPO, because to him what occurred at the door verified Ms. Polkowski's allegations against Mr. CRESPO. (P.T. 33).

The agents knocked on JOSE CRESPO's door for about a minute to a minute-and-a-half, and identified themselves as federal officers. (P.T. 14, 35, 38-39). Special Agent Hunt could not remember exactly what was said before the door was opened, but Special Agent Garcia remembers saying, "Open the door. Police officers." (P.T. 51).

It is uncertain from Agent Hunt's and Agent Garcia's testimony whether it was JOSE CRESPO or Diana Jiminez who opened the apartment door, but when it was opened they were standing next to each other. (P.T. 36). According to Agent Hunt, Diana Jiminez was agitated and loud, and asked the officer "What do you want?" Agent Hunt responded to her in English, stating in effect that they were not interested in her but told her, "I want to speak with Jose." According to Agent Hunt, Diana Jiminez said, "Alright, come in." (P.T. 15, 34, 36, 38-39). The officers entered Jose Crespo's apartment within fifteen seconds from the time the door was opened. (P.T. 39).

Agent Garcia requested JOSE CRESPO and Diana Jiminez to sit down on a couch. They both complied, and Agent Garcia began speaking with them. (P.T. 16, 51). In the course of the questioning by Agent Garcia, JOSE CRESPO denied having threatened Ms. Polkowski. When Agent Garcia told JOSE CRESPO that he had heard JOSE CRESPO threatening Ms. Polkowski, JOSE CRESPO allegedly admitted that he knew her, but denied having been involved in a three-kilogram cocaine deal with Ms. Polkowski, or having threatened her life. JOSE CRESPO also denied that he had any weapons in his possession. (P.T. 17-18, 19-20, 51). JOSE CRESPO and Diana Jiminez were both handcuffed and placed under arrest, but the timing of these events is not clearly established by the record. Agent Hunt testified at one point that JOSE CRESPO was arrested within a minute of the officers' entry into the apartment. (P.T. 36). At another point Agent Hunt testified that it was a couple of minutes before Gerardo Crespo appeared at the apartment, and that both Jose and Gerardo Crespo were arrested at the same time, which was less than the ten minutes after the officers entered the apartment. (P.T. 18, 19). Agent Garcia also testified that Gerardo and JOSE

CRESPO were arrested at the same time, which was five minutes after the officers' entry into the apartment. (P.T. 53, 62). It is also unclear when Diana Jiminez was handcuffed and placed under arrest. At one point Agent Hunt testified that she was arrested when cocaine was found in a closet in the apartment, and on another occasion he testified that she wasn't arrested until after cocaine was found in her pocketbook. (P.T. 36-37). At some point, however, Ms. Polkowski, whom the agents had asked to wait outside of the apartment, knocked on the door. When the door was opened, next to Ms. Polkowski was Gerardo Crespo. Ms. Polkowski identified Gerardo as the other individual that had been threatening her and her family. (P.T. 52, 53). Agent Garcia advised the three of the charges against them, and read the three of them their constitutional rights from a DEA form. (P.T. 53, 54). (The DEA from used by Agent Garcia does not include any advisement of the right to refuse consent to search. [P.T. 75, 76]) Agent Garcia again questioned JOSE CRESPO about his knowledge of Ms. Polkowski and whether or not he had tried to sell any cocaine to her. (P.T. 54). JOSE CRESPO responded that he had never sold her any cocaine. (P.T. 55). Agent Garcia then asked if JOSE CRESPO had any contraband in his apartment, and JOSE CRESPO told Agent Garcia that he could look around if he didn't believe him and that he had nothing to hide. (P.T. 55). Agent Garcia then asked JOSE CRESPO what he meant by "look around" and whether that meant that the officers could search, to which JOSE CRESPO replied, "Yes." (P.T. 55).

Agent Garcia then turned to Ms. Jiminez and asked her if she lived in the apartment, to which she replied, "Yes." Agent Garcia then asked if she was allowing the officers to search the apartment, to which she replied, "Whatever my husband said, yes." (P.T. 55). At this point it appears that Ms. Jiminez was crying. (P.T. 62, 36). According to

Agent Garcia the group was in custody for approximately five minutes before permission to search was requested. (P.T. 76). It was at this juncture that Agent Garcia instructed the other agents to begin a search, and cocaine was discovered in a closet of the apartment, as well as in Diana Jiminez's pocketbook.

JOSE CRESPO and Diana Jiminez both testified that after JOSE CRESPO closed the apartment door, they looked through the peep-hole of the door, and saw one or two men with guns in their hands. Diana Jiminez testified that she saw one of the men pointing a gun at the door, and she began to cry. (P.T. 36, 80-83, 87, 98). Their testimonies also indicated that the police told them to open the apartment door, or otherwise, there would be trouble, and the police would knock the door open. (P.T. 98). JOSE CRESPO testified that when the officers started to kick and bang on the door, he pulled Diana Jiminez to the side, and opened the door, because he feared the authorities might hurt him and his wife. (P.T. 98). He also testified that when the door opened the officers pushed him into a seat, and told him that he was under arrest. (P.T. 98). He denied that he ever gave the officers permission to enter the apartment or to search it. (P.T. 98-99). He also testified that two of the agents took him into the bedroom and hit him, and that he was never read his constitutional rights until he was taken from the apartment. (P.T. 103).

Although the trial court found that the testimonies JOSE CRESPO and Diana Jiminez were not credible, and found that the consent to search was not extracted as a product of physical abuse of JOSE CRESPO, the trial court did find that when the agents approached the apartment, they did so in a manner that prevented Diana Jiminez and JOSE CRESPO from voluntarily consenting, because their consent was overwhelmed by the officers'

show of force. (App. A, *infra*). Based upon the agents' testimonies regarding the conversation which took place between JOSE CRESPO and Ms. Polkowski, the trial court ruled that the officers had authority to make an immediate arrest of Mr. CRESPO because a crime had been committed within their presence. (App. A, *infra*). Although the trial court ruled that the opening of the apartment door and the officers' entry into the apartment was not done consensually, it also ruled that the arrest within the apartment was justified on the basis of "hot pursuit", and exigent circumstances, specifically citing to *United States v. Martinez Gonzales*, 686 F.2d 93 (2d Cir. 1982). (App. A, *infra*). The trial court ruled that the warrantless search of the CRESPO apartment was based upon valid consent. The District Court Judge stated that this was not inconsistent with the nonconsensual opening of the door and entry into the apartment, reasoning that JOSE CRESPO was questioned before he was actually arrested, given his full *Miranda* rights upon arrest, and appeared to be an "arrogant and self-assured" person, and at the time was in full control of his faculties. (App. A, *infra*). The trial court also found that while Ms. Jiminez was hysterical, her consent was free and voluntary as well, because she consented in reaction to her husband's giving his consent. (App. A, *infra*).

On appeal, the Second Circuit disagreed with the trial court's reasoning that Mr. CRESPO's arrest was set in motion in a public place, and that the agents were permitted to enter his apartment in "hot pursuit" under *United States v. Santana*, 427 U.S. 38 (1976). The Second Circuit reasoned that there was no precise finding as to Mr. CRESPO's position when he spoke to Ms. Polkowski, and that at most his apartment door was half-opened. The Second Circuit noted, however, that even that degree of exposure was induced by the DEA agents who were seeking to flush Mr. CRESPO out of his apartment, and

in those circumstances agreed with the ruling in *State v. Morse,* 125 N.H. 403, 480 A.2d 183 (1984), that *Payton v. New York, supra,* would apply so as to prohibit entry into his apartment. On the other hand, the Second Circuit agreed with the trial court's analysis that entry into Mr. CRESPO's apartment was justified because the officers were confronted with "exigent circumstances", as that exception to the Warrant Clause to the Fourth Amendment had been adopted by the Circuit in *United States v. Martinez-Gonzalez,* 686 F.2d 93 (2d Cir. 1982). The Second Circuit also adopted the trial court's findings and rulings with respect to the voluntariness of Mr. CRESPO's consent to search his apartment. (App. B, *infra).*

III.

REASONS FOR GRANTING WRIT

In *Payton v. New York,* 445 U.S. 573 (1980), this Court held that the Fourth Amendment prohibits the police from making a warrantless, non-consensual entry into a suspect's home in order to make a routine felony arrest. In *Payton,* this Court recognized that the physical entry of the home, whether to search or arrest, is the chief evil against which the Fourth Amendment is directed. Writing for the majority, Mr. Justice Stevens observed that the first clause of the Fourth Amendment is specifically directed at "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Relying on *Coolidge v. New Hampshire,* 403 U.S. 347 (1967), and other decisions which have found a person's privacy interest at its greatest within the confines of the home, Mr. Justice Stevens observed, "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." For Fourth Amendment

purposes, of course, arrests are merely one form of "seizure", no different from the seizure of evidence.

Crucial to the Court's holding in *Payton,* then, are the zone of privacy created at the threshold of the home, and the additional burden that a person's privacy interest in his home places on the State to obtain a warrant before entering to search or arrest. This Court emphasized that the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: The breach of the entrance of an individual's home. While Mr. Justice White's dissenting opinion argued that the holding in *Payton* ignored the premise of *Katz v. United States,* 389 U.S. 347 (1967), that the Fourth Amendment protects people, not places, at the center of *Payton,* is the recognition that privacy interests are closely associated with property rights in our society. *Rakas v. Illinois,* 439 U.S. 128 (1978). The reasoning in *Payton* also disagreed with the view that the principles which guided the holding in *United States v. Watson,* 433 U.S. 411 (1976) were dispositive in situations such as this. *Watson, supra,* recognized that police officers may make warrantless arrests in public places. First, the *Payton* majority observed that the common law rule on warrantless home arrests was not as clear as the rule on arrests in public places, which have always been clearly permitted. In addition, the majority noted that, although there was sharp disagreement among the common law authorities as to the legality of warrantless entry into the home to make a felony arrest, the weight of authority supported the warrant requirement, or at least supported the view that there were substantial risks in proceeding without one.

In *Payton* it was also observed that the trend among the state courts ruling on the question during the decade

preceding the decision had been to declare illegal such warrantless entries into the home. This Court found unpersuasive arguments that effective law enforcement has suffered in those states that had adopted a warrant requirement along the lines of the holding in *Payton*.

In the instant matter, there is no question that the arrest of the defendant took place within his home. Moreover, in contrast to cases such as *United States v. Santana*, 427 U.S. 38 (1976), as recognized by the Second Circuit in this matter, JOSE CRESPO's exposure to public view within the hallway of his apartment building was not an act of volition on his part independent from police conduct designed to elicit that exposure. In *Santana, supra*, the police surveilled a purchase of heroin at Santana's residence. Undercover officers then drove a couple of blocks away to meet with, and arrest, the purchaser. The officers then returned to Santana's residence and found her standing directly in the threshold of her doorway, so that one step out would have been in the public, and one step back would have put her in her own home. The officers shouted "Police", and Santana retreated into the vestibule of her house, carrying a brown paper bag in her hand. *Santana, supra*, 427 U.S. at 40, n.1. The ruling in *Santana, supra*, is an extension of the concept that what "a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). In the instant matter, however, Mr. CRESPO would not have been visible to anyone standing in the hallway of his apartment building had not the police decided to set upon a plan to bring him to his doorway, by creating a confrontation between Ms. Polkowski and Mr. CRESPO.

Therefore, to the extent that the trial court ruled the officers had justification to immediately arrest Mr. CRE-

SPO while he stood in his doorway, the denial of Mr. CRESPO's motion to suppress cannot be affirmed. In the case of Theodore Payton, the officers actually broke into his apartment where there was no response to their knock on the door. In the case of O.B. Riddick, whose appeal was heard along with Theodore Payton in *Payton v. New York, supra,* the officers knocked on the door of his house, and Riddick's three-year old son opened the door, allowing the officers to see Riddick sitting on his bed. Both of the warrantless entries to effect the arrests in the *Payton* case were held unconstitutional, despite the fact that in Riddick's case the door to his home was opened voluntarily and the interior was exposed to public view. Furthermore, cases construing *Payton,* have not consistently followed a mechanical approach that the threshold of one's home is a public place subject to the rule in *Watson, supra. See,* e.g., *United States v. Morgon,* 743 F.2d 1158 (6th Cir. 1984), *cert. denied,* 105 S.Ct. 2126 (1985) (Held: The warrant requirement was applicable where the defendant answered the door and the officers then crossed the threshold to arrest); *People v. Oliver,* 417 Mich. 366, 338 N.W. 2d 167 (1983) (*Payton* was assumed to be applicable where the defendant answered the door, but then stepped back into the room); *State v. Morse,* 125 N.H. 403, 480 A.2d 183 (1984) (The court noted a split of authority on the issue, and held the *Payton* warrant requirement was applicable where the defendant answered his door at the request of police, but was standing inside.); *State v. Holman,* 103 Wash.2d 426, 693 P.2d 89 (1985) (The court held that the police were prohibited from arresting a suspect while the suspect is standing in the doorway of his house, even if the police never cross the threshold, as it is not the location of the arresting officer, but rather the location of the arrestee which is relevant).

More importantly, it is submitted herein that Mr. CRESPO did not as a matter of law forfeit his privacy interests merely because he sought refuge within his home upon learning of the police subterfuge in this case, and the police intention to seek him out. To hold otherwise would be to penalize the defendant for exercising his constitutional rights. In *McKinney v. George*, 726 F.2d 1183 (9th Cir. 1984), two officers, acting on a neighbor's complaint of disturbing the peace, without a warrant, but with probable cause, went to McKinney's apartment. They knocked on McKinney's door, and when McKinney answered their knock, the officers did not cross the threshold of the doorway. Instead, the officers told McKinney to come along with them, and he did so. *McKinney, supra*, 726 F.2d at 1188. The *McKinney* court's discussion of the issue is cursory, but it appears that McKinney's assent to the police statement "Come along" was both voluntary and uncoerced (which is distinguishable from the trial court's ruling in the instant case regarding the non-consensual nature of the police officers' entry in JOSE CRESPO's apartment). What is of note for the instant matter, however, is the *McKinney* court's opinion that a different case would appear "if [McKinney] had refused and the police had come in and arrested him." *McKinney*, 726 F.2d at 1188. In contrast to the facts in *McKinney*, in the instant case JOSE CRESPO acted in perhaps the most emphatic way possible to exhibit his desire to refuse entry into his home — he closed the door in the officers' faces.

The opinion in *State v. Morse, supra,* contains language which is directly relevant to this particular issue:

> "... *Santana* may be distinguished from the instant case in two respects: First, the defendant in *Santana* was standing directly *on* the threshold of her door, rather than *inside* it; and second, she was there *when*

> *the police arrived,* and not because the police procured her appearance by knocking on her door . . .
>
> "The first distinction is important because of the *Payton* court's clear language concerning the scope of the Fourth Amendment: 'In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.' . . . "The second distinction is crucial because the 'exigency' in *Santana* arose by chance, as a result of the defendant's being in her doorway when the police arrived. In this case, however, any exigency arising from the defendant's retreat was created solely by the police action in knocking on the defendant's door." *State v. Morse, supra,* 125 N.H. 403, 480 A.2d 183 (1984).

The court in *Morse* concluded that the plain view of the suspect was not inadvertent, and consequently, entry would be permissible only if there were pre-existing exigent circumstances, which was not the case.

In the instant matter, there is no showing that Mr. CRESPO was ever in the hallway of his apartment building. Indeed, it appears that Mr. CRESPO's conversation with Ms. Polkowski occurred in his half-open doorway. In light of this fact, the trial court's ruling that Mr. CRESPO's arrest was effected in "hot pursuit" is wholly unsupportable by the record.

Likewise, reliance by the courts below upon *United States v. Martinez-Gonzalez,* 686 F.2d 93 (2d Cir. 1982), is misplaced. *Martinez-Gonzalez, supra,* adopted the standards set forth by the District of Columbia Circuit Court of Appeals in *Dorman v. United States,* 435 F.2d 385, 391

(1970). As interpreted by the Second Circuit, those standards have been summarized as follows:

> 1. The gravity or violent nature of the offense with which the suspect is to be charged;
>
> 2. Whether the suspect is "reasonably believed to be armed";
>
> 3. "A clear showing of probable cause . . . to believe that the suspect committed the crime";
>
> 4. "A strong reason to believe that the suspect is in the premises being entered";
>
> 5. "A likelihood that a suspect will escape if not swiftly apprehended"; and
>
> 6. The peaceful circumstances of the entry. *Martinez-Gonzalez, supra,* at 100.

It has been held that the *Dorman* criteria should not be used as a pass or fail checklist for determining exigency, but that the ultimate test is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant. *United States v. Adams,* 621 F.2d 41, 44 (1st Cir. 1980). The *Dorman* and *Martinez-Gonzalez* courts both recognized that the determination of exigent circumstances *vel non* necessarily turns upon whether in light of all the facts of the particular case there was "urgent need" that justified a warrantless entry. *Dorman, supra,* 435 F.2d at 391; *Martinez-Gonzales, supra.* This Court has recognized *Dorman* as a leading federal case defining exigent circumstances, but declined approving all of the factors adopted by *Dorman* in *Welsh v. Wisconsin;* 466 U.S. 740 (1984). A number of courts and commentators have doubted the soundness of the *Dorman* approach as too sophisticated, by requiring police officers to make on-the-spot decisions through a complicated weighing and balancing of a multitude of

imprecise factors.[2] For example, is the situation presented in *United States v. Lindsay,* 506 F.2d 166 (D.C. Cir. 1974). There, the court, after a careful and elaborate evaluation of all of the circumstances surrounding the entry, was able to conclude that the first, second and sixth *Dorman* factors were present, that the third and fourth factors were not present, that the arguments on both sides concerning the fifth factor were of equal weight, and that the seventh factor was washout. Even assuming the police were able to resolve each of the seven issues in a like manner while they were outside the premises, it is not gainsaid that this tells them that a warrantless entry may be made or that it may not be made. Though the *Lindsay* court held that a warrantless entry is unconstitutional on such facts, it is doubted that an officer could have reached that conclusion with confidence on the basis of *Dorman,* just as it is to be doubted that *Lindsay* affords a basis for him to decide a case involving a somewhat different mix of factors. Petitioner contends that the criteria set out in *Dorman,* applied in the checklist-like fashion which was done by the lower courts in this case, also demonstrates how the *Dorman* formulation of the exigent circumstances

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[2]See *Llaguno v. Mingey,* 763 F.2d 1560 (7th Cir. 1985) (the court cautions against a checklist-type of analysis of *Dorman*); *State v. Hardin,* 359 N.W.2d 185 (Iowa 1984) (the *Dorman* criteria should not be rigidly applied); *State v. Hert,* 220 Neb. 447, 370 N.W.2d 166 (1985) (the court held that it was not realistic to expect law enforcement officers to run through the *Dorman* checklist and weigh various factors); *State v. Page,* 277 N.W.2d 112 (N.D. 1979) (the court took note of this criticism and concluded that therefore the *Dorman* guidelines are not to be interpreted as cardinal maxims, rigidly applied to every case). Among the notable commentaries criticizing *Dorman* are Donnino & Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Albany L.Rev. 90, 99-106 (1980); Harbaugh & Faust, "Knock on Any Door" — Home Arrests After *Payton* and *Steagald,* 86 Dick.L.Rev. 191, 225 (1982); Note, 1978, U.Ill.L.F. 655, 678.

exception is unsound and incomplete in principle, and in practice, leads to the result that the exception swallows up the general prescription against warrantless in-home entries to arrest, which, according to *Payton*, goes to the very core of Fourth Amendment protections.

Even if one assumes for the sake of argument that the *Dorman* criteria correctly defined the exigent circumstances exception to the warrant requirement, there was a manifest failure of supporting evidence to fulfill the last two standards, as enunciated in *Martinez-Gonzalez, supra,* and listed above. The likelihood that Mr. CRESPO would escape if he was not swiftly apprehended within his home is belied by the fact that the officers took precautions to station a lookout outside of Mr. CRESPO's apartment, for just such a contingency. Given this deployment, there was absolutely no likelihood that Mr. CRESPO would be able to escape from his apartment. Furthermore, there was no reason given by the Government for simply maintaining surveillance of Mr. CRESPO, once he was identified, and then obtain a search and/or arrest warrant, as the case may justify; or, if Mr. CRESPO did leave the premises, arrest him in a public place, as allowed under the authority of *United States v. Watson, supra.* As to the peaceful circumstances of the police entry in this case, it is submitted that the trial court's attempt at distinguishing coercive activity from violent activity is actually a distinction without a difference for these purposes. It is clear that the police activity in this case in which they suddenly rushed to Mr. CRESPO's door, loudly announced their identity and purpose, displayed their official shields, had their sidearms visibly prepared for use, and banged loudly on Mr. CRESPO's apartment door cannot in the abstract, or as applied in this case, be considered peaceful entry. The police activities in this

case, after all did, by all accounts, result in hysterics on the part of Ms. Jiminez.

In addition, the confrontation between Mr. CRESPO and Ms. Polkowski did not even establish that Mr. CRESPO was presently armed and dangerous. He supposedly alluded to others who would do harm to Ms. Polkowski, His words and actions did not indicate that any violence was imminent, which is evidenced by the fact that the officers claimed they had provided no protection to Ms. Polkowski during the period of their investigation in this case, and also claimed their guns were never unholstered at any time while Ms. Polkowski was at Mr. CRESPO's door. Petitioner would also submit that the trial court over-emphasized its findings (which amounted actually to judicial notice) regarding the dangerousness of the crimes involved herein. This particular factor of the *Dorman* analysis is of questionable viability, at least when applied in the abstract, in light of this Court's affirmance that a "murder-scene" exception to the warrant requirement is unconstitutional. *Thompson v. Louisiana,* 105 S.Ct. 409 (1984); *Mincey v. Arizona,* 437 U.S. 385 (1978).

With respect to the third factor, a review of the record will show that there was not a clear showing of probable cause to believe that Mr. CRESPO committed an offense under Title 18, U.S.C. Section 1512 during the confrontation forced upon him by Ms. Polkowski at his doorstep. Indeed, while one agent testified that he heard JOSE CRESPO use the word "killers", and also say "I have nothing to do with you, but my people will deal with you." (P.T. 49, T.T. 233), another agent testified that he later learned from the Spanish speaking agent who overheard the conversation that JOSE CRESPO's response to Ms. Polkowski was "Stay away from me. I have nothing to do with you, my people will deal with you." (P.T. 12-13). It should also be noted that the arresting officers never

testified that they arrested JOSE CRESPO on the basis of any belief that he committed a crime under Title 18, U.S.C. Section 1512, and the Government never brought any such charges against Mr. CRESPO. This record does not indicate a "clear showing of probable cause" that what was heard at Mr. CRESPO's threshold amounted to a crime.

Moreover, it appears that the *Dorman* analysis fails to take into consideration of police conduct which creates exigencies. It has been stated that "exigency under the Fourth Amendment must be a product of external events, not police ingenuity." *United States v. Bell,* 488 F.Supp. 371, 374 (D.C.Dist. 1980). As already discussed herein, whatever exigency did exist was the product of police activity. The exigent circumstances doctrine should only apply when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action. *United States v. Satterfield,* 743 F.2d 827, 844 (11th Cir. 1984). It is well settled that when officers create an exigency, the supposed need for immediate action is illusory, and law enforcement officers cannot justify a search or arrest on the basis of exigent circumstances of their own making. *United States v. Scheffer,* 463 F.2d 567 (5th Cir.), *cert. denied,* 409 U.S. 984 (1972); *see also United States v. Hare,* 589 F.2d 1291, 1294 (6th Cir. 1979); *United States v. Rosselli,* 506 F.2d 627, 630 (7th Cir. 1974); *United States v. Curran,* 498 F.2d 30, 34 (9th Cir. 1974); *Niro v. United States,* 388 F.2d 535, 539 (1st Cir. 1968).

The first question to be determined is whether the agents could have obtained an arrest warrant in advance of the planned encounter with Mr. CRESPO. Clearly, what occurred at Mr. CRESPO's apartment with Ms. Polkowski did not add to any probable cause which the officers may have had at the time. All of the officers initially appeared to lack was the last name of Mr.

CRESPO and the specific apartment within which he resided. If probable cause was good on the date of his arrest, it would have been equally as viable days before, when the last alleged threat on the part of Mr. CRESPO occurred. The officers already possessed Mr. CRESPO's first name, and a physical description; and Agent Hunt had physically observed Mr. CRESPO months earlier and recognized him on October 1, 1986 based upon that observation. Corroboration of their informer's information occurred months earlier in February of 1986, when Mr. CRESPO was allegedly present at Ms. Polkowski's home to consummate a narcotics transaction. Ms. Polkowski could give a description of Mr. CRESPO, and at least one of the officers had surveilled him previously. Thus, a "John Doe" warrant reasonably describing "Jose" would have been viable. *See generally,* the annotation at 49 ALR 2d 1209 (1956). The officers took no measures to determine Mr. CRESPO's last name or his specific apartment number by surveillance, interviews, utility checks, or even examination of the apartment mailboxes. Under these circumstances, it is clear that there was a manifest lack of justification to excuse no attempt at procuring an arrest warrant prior to confronting Mr. CRESPO at his apartment. Accordingly, even if one examines the record in a light most favorable to the Government, the trial and appellate courts' ruling that exigent circumstances existed to except Mr. CRESPO's arrest from the dictates of *Payton v. New York*, is clearly erroneous.

The legality of the police officers' entry into Mr. CRESPO's apartment to effectuate an arrest has direct bearing upon the effectiveness of the "consent" purportedly given by Mr. CRESPO for the search of his apartment. Any evidence found as a result of that consent must be suppressed if the conduct preceding the giving of that consent was not sufficiently attenuated from the prior illegal conduct. In other words, it was the Govern-

ment's burden to prove the admissibility of the evidence seized from Mr. CRESPO's apartment by showing that his purported consent was sufficiently an act of free will to purge the primary taint of the unlawful seizure of his person. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963); *Florida v. Royer*, 460 U.S. 491, 502-03 (1983) (plurality opinion) (consent to search of luggage tainted by prior illegal detention of defendant); *United States v. Perez-Esperaze*, 609 F.2d 1284, 1289 (9th Cir. 1979).

On this particular point, Mr. CRESPO submits that if this Court accepts his argument that he was illegally arrested, in violation of his privacy rights under *Payton v. New York, supra*, the record does not show any significant lapse of time or any significant intervening event that would serve to dissipate the taint of that arrest. Indeed, the consent was obtained only a few moments after the illegal entry into Mr. CRESPO's apartment. More importantly, the events which occurred during this period of time do not in any way purge the primary taint of the illegal entry into Mr. CRESPO's apartment. Rather than dissipating that taint, the police officers' conduct compounded it. Significantly, during this period of time, Mr. CRESPO was placed in handcuffs and interrogated. The trial court's reliance upon the fact that *Miranda* warnings were given is misplaced. The warnings which the court found were given did not inform Mr. CRESPO that he had the right to refuse permission to search. Furthermore, the Court's ruling in *Brown v. Illinois*, 412 U.S. 590 (1975), indicates that the giving of *Miranda* warnings does not work *per se* to purge the taint of an illegal arrest. Borrowing from the *Brown* analysis, one can readily see that the purported consent to search Mr. CRESPO's apartment was the product of illegal police conduct. Mr. CRESPO's consent was given only a few minutes after his illegal arrest (in *Brown*, the suppressed statement was separated from the illegal arrest by less than two hours),

there were no intervening events of significance whatsover to show that the consent was purged from the taint of Mr. CRESPO's illegal arrest, and the impropriety of the arrest was obvious. In short, the arrest, both in design and in execution, was investigatory, undertaken in the hope that something might turn up, and the manner of arrest gives the appearance of having been calculated to cause surprise, fright and confusion. Indeed, as the record clearly indicates in this case, this is not a case in which the decision to give consent was "completely self-motivated", was unforeseeable by the agents, or where excluding the evidence from the resulting search would serve no deterrent purpose. *Brown v. Illinois, supra,* 412 U.S. at 610 (Powell, J., concurring in part); *United States v. Perez-Esperaze, supra,* 609 F.2d at 1289.

Even if one assumes for the sake of argument that Mr. CRESPO was not illegally arrested in his apartment on the evening of October 1, 1986, it is respectfully submitted that the Government did not meet its burden to establish that the purported consent was freely and voluntarily given, and not merely the submission to police authority. One must still examine the circumstances under which Mr. CRESPO came into custody (*Florida v. Royer, supra,* at 502-03), his awareness of the right to withhold consent (*United States v. Mendenhall,* 446 U.S. 544 (1980)), his age, intelligence and education (*United States v. Mendenhall, supra,* 446 U.S. at 588) and the nature of the police behavior (*United States v. Verrusio,* 742 F.2d 1077, 1080 (7th Cir. 1984)).

On the issue of the voluntariness of Mr. CRESPO's consent, it is submitted that the rulings below are irreconcilable with the trial court's finding that the entry into Mr. CRESPO's apartment was nonconsensual. As argued before, the events which occurred after the entry were just as intrusive as the police conduct prior to the entries,

if not more so. After the entry into Mr. CRESPO's home, he was handcuffed and interrogated. His brother appeared at the apartment and he was arrested. His wife was arrested and, according to the trial court, was in hysterics. Clearly, in-home arrests are substantially more intrusive than arrests in the public, and it is submitted that this is a significant factor for determining whether Mr. CRESPO's purported consent was voluntary. That the purported consent was no more than submission to authority is abundantly clear by the record. Mr. CRESPO was surprised by the officers' presence in his secured building, as they rushed towards his door,[3] and with the display of the officers' weapons, their loud announcement of their presence and desire to enter Mr. CRESPO's apartment, together with their banging and knocking on the front door, there was ample evidence to support the trial court's ruling that the entry into Mr. CRESPO's apartment was nonconsensual. Mr. CRESPO's arrest, together with those of his wife and brother, their handcuffing, and the interrogation of Mr. CRESPO regarding the nature of his relationship with Ms. Polkowski clearly reflect that the trial court was erroneous in distinguishing the nonconsensual nature of the police officers' entry with that of the nature of the consent given to search. At no time was Mr. CRESPO informed that he had the right to refuse permission to search, and the police officers' conduct throughout the period of their confrontation with Mr. CRESPO did not give Mr. CRESPO any reason to believe that he had a right to refuse consent to search and

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[3]The type of surreptitious entry into Mr. CRESPO's apartment building which occurred in this case has been denounced in a number of Circuits. *See, United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976); *United States v. Case*, 543 F.2d 766 (7th Cir. 1970); *United States v. Fuker*, 543 F.2d 709 (9th Cir. 1976); *but see United States v. Holland*, 755 F.2d 253 (2d Cir. 1985); *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977).

his invitation to "look around" was just as obviously a reaction to these officers' display of authority.

CONCLUSION

Mr. CRESPO submits that the admission into evidence of the cocaine illegally seized from his apartment was not harmless error beyond a reasonable doubt. Other than the cocaine seized illegally from Mr. CRESPO's apartment, the primary evidence against him at trial came from the testimony of Ms. Polkowski, the paid Government informant. Obviously, the jury had some doubt as to the credibility of Ms. Polkowski in the first instance, as Mr. CRESPO was acquitted of the one possession charge which was based solely upon Ms. Polkowski's testimony. Undoubtedly the seizure of cocaine from Mr. CRESPO's apartment provided corroborating evidence of Ms. Polkowski's other allegations, leading to his conviction on the other counts of the indictment. For all of the foregoing, then, it is respectfully submitted that the instant petition should be granted.

Dated: January 25, 1988

Respectfully submitted,

DAVID A. ELDEN

Attorney for Petitioner
Jose Crespo

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

— against —

JOSE CRESPO, GERARDO CRESPO,
Defendants.

United States Courthouse, Brooklyn, New York
December 1, 1986 — 10:00 a.m.
CR-86-669

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JACK B. WEINSTEIN,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by dictation.

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THE CLERK: United States of America versus Jose Crespo and Gerado Crespo.

MR. STONE: It is the defendant Jose Crespo's position that this was a search without a warrant not based upon probable cause and not based on consent. I think that the government has offered in this case a background of the situation and they claim that there was an alleged sale of cocaine or attempted sale of cocaine in February and threats in July and September.

At no time did they attempt to even get a John Doe which they could have done. In this particular case they came to an apartment to make a random search and they knew a person's last name or first name and they did not know his last name, and the only — they only knew that a person lived on the second floor. They attempted to verify absolutely nothing that the informer told them concerning this person as to where he lived and whether in fact he did live in this apartment. We then have a conflict between the agents and I submit certainly a substantial conflict —

THE COURT: Sit between the two just for purposes of full interpretation.

MS. LANUS: I thought it was only with regard to one your Honor.

THE COURT: It's true, but sit so they both can hear.

MR. STONE: Between the defendant and the defendant's witnesses.

Now, the agents at all times, your Honor, have testified that when they knocked on this door they intended only to talk to Jose and that is brought out in Hunt's testimony on page 34 and Garcia's testimony on page 51 of the record your Honor. They knocked on the door with only one intention and that is the intention to talk and to advise the occupant of that apartment that they should not or he should not interfere with one of their informers and if he did interfere with one of their informers they would be subject to an arrest. That certainly negates any argument that the agents have that they were overly concerned about that alleged threat and overly concerned or even believed or had reason to believe that they — that this person actually offered cocaine and did so with substantial threats in July and September of this year. I think common sense will dictate to us that if they really believed that these threats were substantial and those events took place not only would they have charged the defendant with that in a complaint and in the indictment, but I submit they would have gotten a warrant for this person's arrest whether they knew him or not.

THE COURT: Excuse me, do you want an adjournment?

MR. STONE: I thing we will see what happens after today.

THE COURT: If you don't feel well we will just stop.

MR. STONE: We can proceed your Honor.

We then have this situation where the agents come in and they tell us that they are coming in supposedly to talk to someone who they believe used shotguns and pistols against one of their informers who is a reliable informer, yet they didn't intend to draw guns and they did not intend to arrest.

Now, we have several conflicts of what took place at the door. You saw the pictures in the apartment and I submit that it is very difficult for one person to knock at a door and turn around and walk toward the agents, relay completely the alleged conversations while three or four agents are hiding behind the stairs and they knock at a door — they knock a door which is slammed in their face.

I submit that once they informed the occupants of that apartment that they are federal agents and the door is slammed in their face, I think it's very reasonable for a Court to assume that the person inside the apartment didn't want them to come into the apartment. Yet they still tell us even at that point that they only wanted to talk to Jose.

So they knock on the door for approximately one minute or one and a half minutes and there is a conflict as to who opens the door and on one occasion Agent Hunt testified that it was Jose, and another occasoin they both stated that it was Diana Jiminez who opened the door, and nevertheless they walked into the apartment and asked both of the occupants to sit on the couch and after a conversation with Jose and only after that conversation did they then formally place Jose under arrest.

So basically it is my position that they came into the apartment illegally and they then questioned Jose. If the entry into the apartment is illegal and if subsequent conversations that they obtained from Jose was illegal then what he said could not be used as a basis for an arrest. The government claims that Jose at first denied knowing the informer Maria and then after a minute or so of questioning, admitted knowing her although he denied the substance of the allegations both concerning cocaine and the alleged threats, but it was after that conversation that he was placed under arrest.

Now, I submit that that conversation also is the fruit of an illegal entry and an illegal arrest and Wngson versus United States would be dispositive of that area. I did not quote that in my brief, but I certainly could provide the Court with the citation although I believe that the Court is familiar with that case, and they then tell us afterwards that they spent a considerable period of time asking both Jose and Diana for their consent, so obviously at this point the agents are themselves or they feel that they are on tenuous ground and they insist on using the consent theory to justify their search.

Now, we have another conflict in here and we have a conflict concerning the arrest of Gerardo Crespo and according to Garcia, Gerardo Crespo knocks on the door after Maria knocks on the door and he is brought in and pointed out and then arrested.

I submit that on behalf of co-counsel this arrest is further evidence of government lawlessness and the arrest of Gerardo Crespo has not basis either in probable cause or in certainly without a warrant in this case. They drag him into the apartment and they then have a conflict as to when both of these persons are arrested. They arrest him and then they conduct a search.

There is further conflict of when the cocaine was found and at one point in the record I believe Agent Hunt said it was a matter of a second, and afterwards Agent Garcia tells us that they found the cocaine five minutes later. They then tell us that they arrest Diana Jiminez immediately after the cocaine is found in the closet and later on they tell us that they found cocaine on her person and arrested her after they found the cocaine in a purse, so we have two conflicting stories there.

We also have two other conflicting stories as to how they entered the apartment. Hunt tells us that they

entered the apartment I believe on page 31 when subject one was in the vestibule and just walked in and Garcia tells us that they rang a series of bells and someone let them in, and there was nobody in the vestibule, so one of the agents is either mistaken or misleading the Court on that issue.

Now, there is also another issue that I believe concerns a substantial conflict and that is whether or not there was any consent to search form given to either of these defendants.

Agent Hunt tells us that on two occasions he asked Jose Crespo to sign a written consent form that was on page 20, and on page 24 Agent Garcia vehemently denies that anybody asked Jose Crespo to sign a consent to search form, and in fact he states that they didn't have a consent to search form with them.

Now, I think that goes generally into the ideas that the agent had whether they really had a valid arrest and whether they really had a consent and whether they really were interested in trying to obtain the consent of the defendant and the person that he lived with.

It is conceded that either of these people could have given the agents consent, but I submit that you saw Diana Jiminez testify and she offered into evidence a photograph, or photographs and she told us that she did not give consent.

I submit that the knocking on the door, and the slamming of the door, and the displaying of authority which is the badges and shields is enough to negate consent as is the placing of both persons on a couch surrounding them with four agents, and whether you accept the fact that guns were drawn or not, they certainly submitted to lawful authority.

I submit there is not one consent at all in this case, and in fact I think the evidence is overwhelming that there was absolutely coercion in the entry and in any subsequent search, and I think it is interesting that the agents never got a warrant and tried to justify searching a closet with a closed container and based upon two tenuous situations once an alleged conversation which I submit is loaded with doubt and number two the consent which I submit has not been proven under the facts, and under the law in this particular case.

I respectfully request that the motion to suppress both as to the statements taken after the entering into the apartment and the container found in the closet be granted.

MR. GERBER: It is the government's position that this consent was really given and that the government has proven that that consent was freely given by the preponderance of the evidence and has satisfied its burden. There was clearly a legitimate reason for the agents to be in that particular building. They had received information that one of their confidential informants had been threatened and Agent Hunt testified that he had identified Jose and he saw Jose Crespo at the time of the initial transaction in February.

All this occurs now and this is the only information they have other than the fact that his name was Jose and they didn't know where he lived and they didn't know anything about him.

Now, in September Ms. Polkowski, the confident informant was finally able to find out where the defendant lived and she only knew that he lived in the second floor of an apartment building. They had every reason to belive that they should be there and their being there and their having Ms. Polikowski knock on the door was clearly

corroborative of what the confidential informant told them, and they gave her instructions to ask the defendant if he opened the door why he was threatening her and that is exactly what she did.

What they heard were threats when they approached the door of the apartment and identified themselves as police and the door was slammed in their face. There are two questions here, your Honor, one of the consent and one of the entry into the apartment.

Now as far as the entry into the apartment, first of all they had a legitimate reason for being there, and second of all the credible testimony was that entry was consensual, that both Diana Jiminez and Jose Crespo opened the door and let the agents in, but even if it had not been consensual, your Honor, under Martin versus Gonzales, the agents had or would have had the right to knock down that door after they had heard the confidential informant being threatened in the hallway, and saw the defendant flee into the apartment.

Now, that case is remarkably similar to this case and would have given them a basis to enter the apartment by knocking down the door. The fact that they didn't do that and knocked on the door certainly adds to their credibility.

Now, once they were in the apartment they asked Jose Crespo what he had said to the woman in the hallway and why he had threatened her and he lied to them and at this point he was arrested.

In the interim his brother had come in and he was also identified by the informant as being the other person who had threatened her and her children with guns and since what the confidential informant had told them had been corroborated by what they heard in the hallway there had

been every reason to arrest him as well and so they arrested him.

The arrest et cetera was legitimate, but this is not a case where the search was done incidental to an arrest, but there was a separate independent consent and that separate independent consent was I submit proven by credible evidence that was given here, and it was only after that consent which was extenuated from the arrest, it was based on that consent that the agents searched the premises.

THE COURT: They arrested first and then searched?

MR. GERBER: And then they searched, yes, but they searched only after the consent, and they arrested and got consent, and then they searched.

Now, on the issue of consent, your Honor, it seems to me that the Court has a clear choice here whether to believe the credible testimony of the agents or whether to believe the defendant here, and what the defendant as in effect testified to is that the agents forced themselves into the apartment and that they arrested him and didn't read him his rights and they they didn't ask permission to search the apartment, and that they beat him up.

Now, let me focus on the beating here —

THE COURT: I don't find any beating issue.

MR. GERBER: The fact that the Court did not find the testimony of the beating credible certainly indicates that the defendant was willing to lie to the Court here and the government submits that he lied to the Court throughout his testimony and he freely consented.

THE COURT: I don't find there was any beating.

MR. GERBER: We submit, your Honor, that the very fact that he would testify here to the beating is an

indicator that he has lied to the Court and that he lied to the Court with respect to the entry into the apartment and that he lied to the Court about the consent with respect to his wife's testimony.

First of all the testimony is cut off short because she sought advice of counsel, and secondly overall —

THE COURT: Well, she didn't ask to have her testimony continued, I would have done so, but I don't see the claim that you weren't permitted to cross examine her.

MR. GERBER: Putting that aside, your Honor, her testimony first of all is that she has a very convenient lack of memory during most of cross examination, and when she did answer questions, I submit that the answers weren't credible.

For example she testified that she lived in that apartment for two and a half years, but had never been in the living room closet.

The living room closet just happens to have six pounds of cocaine and numerous drug paraphernalia.

We asked her about whether or not anyone had been read their rights and she couldn't remember. We asked about what or whether anyone had spoken to her and she couldn't remember. We asked about what was said to her husband and she couldn't remember.

I submit that that failure of her memory was convenient or a convenient way of not telling the Court exactly what happened here and that they both consented to the search probably because they didn't — they thought by consenting to the search they would look more believable to the agents.

Perhaps they thought that the agents wouldn't look carefully if they consented to having them search the apartment or perhaps they thought that maybe by saying

go ahead look around that the agents might think that they were giving their consent and let them go, but whatever the reason why they consented, it is clear from the credible evidence here that they did consent.

Now, with respect to the inconsistencies and the agents' testimony, I submit that there were no real inconsistencies, just minor inconsistencies that frankly show that they were telling the truth here.

For all those reasons, your Honor, the government submits that the motion to suppress should be denied.

MS. TERRELONGE: If I may —

MR. GERBER: The government objects to her participating.

THE COURT: I will be happy to hear counsel, go ahead.

MS. TERRELONGE: Earlier this morning, the Court asked me whether or not I would join in this motion, and at that time I indicated that it was our position that the arrest or the seizure and subsequent arrest of Gerado Crespo was — but after having some afterthought of the agents at that time, the records clearly reveal that Mr. Crespo or that the agents did not go there seeking to talk to Mr. Crespo, but in fact to see Jose Crespo, and that in fact resulted in Mr. Crespo, that is, Gerado Crespo going to the apartment and having hearing the screams of the sister-in-law, that he knocked on the door and was brought into the apartment by the agents and then subsequently arrested, and now they seek to attribute to him to contraband that has been seized in the apartment.

Clearly he has no standing with respect to the contraband that was seized in the apartment. It is not his apartment, however his arrest — he does take issue with the fact that it was done without probable cause and there

are no extraordinarly circumstances and the record clearly reveals that he was seized and first brought into the apartment and then arrested. Thank you your Honor.

THE COURT: The following constitutes the Court's finding of fact and law.

The Court has had the benefit of the observing all the key witnesses in the case and has had excellent briefs and arguments by both sides including that of counsel for the brother.

Jose Crespo and Diana Jiminez reside in the apartment and they were of sufficient age and intelligence to have consented to entry thereto. I find there was no consent beaten out of Jose Crespo, however I do find that the agents when they approached the apartment did so in a manner that prevented Diana Jiminez and Jose Cresop from voluntarily consenting. Their consent was overwhelmed by the show of force.

When Ms. Polkowski approached the apartment of the defendant she had already reported to the law enforcement officials that Jose and his brother had threatened her with violence by guns. It was appropriate and justified for the agents with the witness Ms. Polkowski to enter the apartment house, and whether they entered by the ringing of the different door bells or by following somebody in is irrelevant. She had the right to enter and they had the right to accompany her to protect her against violence.

I find that she approached the door of Jose Crespo and that the agents were concealed on the stairwells as they testified. Jose Crespo opened the door and did converse with Ms. Polkowski.

I credit the testimony of Special Agent Garcia who speaks Spanish and overheard the conversation which was in Spanish. Ms. Polkowski asked Mr. Crespo "Why did

you threaten me; why are you threatening me, and I want you to stop threatening me."

Mr. Crespo included in his answer the word "killer", and then further "I have nothing to do with you, but my people will deal with you."

This was said in light of the background in light of the prior negotiations for drug sales between the two defendants and the witness and Ms. Polkowski and clearly was a threat of physical violence, if not immediate physical violence than violence within the very near future. At this point the agents had seen a crime committed within their presence and under a variety of state provisions and probably under Section 1512 of Title 18 tampering with a witness or an informant in that there was an intentional harassment and threat to disuade a person from reporting matters to a law enforcement officer among other things, and they therefore had the right to arrest him immediately. They knocked on the door and he refused entry, and it is not clear whether he or his wife then opened the door, but that door was opened because they observed weapons in the hands of the agents. Whether those weapons were pointed at the ceiling or held in the hand really is not important, they were clearly the Court finds visible and they would have been unheard of in view of the threats for them not to have their weapons ready, and they did testify that they did have their hands on the weapons so they probably were visible.

Whether they were intended to be visible or not, is really not important.

The occupants of the apartment because of the kicking of the door and the observation of the weapon was overwhelming and when they opened the door it was not with consent, but it was by threat of force, however since they have the immediate right to arrest the defendant

Jose Crespo, they had the right to pursue him into the apartment. The fact that they said they wanted to question him does not or is not permissive on the point of their intentions, and historically would mean here the wife of Jose Crespo was warranted to calm the situation at that point, but from that point on I don't have any doubt that they or that there was an intention to arrest and take him into custody.

It was proper for them to enter into the apartment in hot pursuit, and there had been threats of weapons there, and those threats were confirmed by their observations that they had seen the defendant Jose, but they hadn't seen Gerardo, and I didn't know why Gerardo or whether he was in the building or someplace else in the apartment, and under the circumstances to have an attempted or to get a warrant with the possibility of Jose escaping was not reasonable.

This was as I recall it the second floor was it not?

MR. GERBER: Yes your Honor.

THE COURT: So he could have easily escaped at the back.

I find that they had not taken precautions of stationing men around the back. Once they entered into the apartment they arrested him. They questioned him before making the immediate arrest and he was given full warning of Miranda warnings so that any answers he gave were usable as conversations following Miranda warnings during the course and immediately following a valid arrest.

Once they had entered into the apartment and the defendant Jose Crespo realized he was being arrested and his wife released and he was being arrested, they both voluntarily gave their consent to a search of the apartment.

This finding of fact is not inconsistent with the failure to give consent to enter the apartment. Having observed Jose Crespo I believe he is arrogant and self-assured and that it is quite likely that he believed that the agents would not find these materials which were in a closet on a shelf hidden in a bag. His treatment for example of the cocaine found in his wife's bag indicating that this was mere social cocaine of which he had himself presented to his wife as a kind of an anniversary present indicates a form of arrogance, not a typical of these kind of drug dealers.

He consented to the search, and he was not beaten and he did it voluntarily and he was in full control of his faculties and his wife was hysterical, and she was under his domination so that when he consented she consented as well, not because of a fear of the agents, but rather because her husband had in fact already consented.

Both occupants therefore consented to the search. Her consent was not necessary since the cocaine was not hers. I believe that they found the cocaine almost immediately within a minute or so. Having found the cocaine with a reasonable search of the apartment they had other grounds for keeping him in custody and also keeping his brother in custody even when his brother first entered the apartment. I might add they had sufficient grounds to arrest the brother because of the statement of the witness which had been confirmed by what they had heard from the corridor with respect to threat of Jose.

The arrest of both appeared to be quite valid. It was perfectly proper and sound to search the apartment for guns and for other materials in view for the consent and the surrounding circumstances.

A quick search of the apartment even without consent would have been valid in order to protect themselves

against the possibility that there was another person or guns available in the apartment. Of course they would not have been able to search the closet and open bags without consent.

I find that the wife and the defendant Jose Crespo knew that the police were seeking entry. I find that the police did announce they were law enforcement officials.

I find that they were both fully advised of their rights and any statements made after that advice in view of the legality of the arrest and the search is admissible.

A beating was not necessary and in fact never took place.

As a matter of law therefore I find that entry into the apartment was not based on a valid consent, it was based on sufficient exigent circumstances to justify a non-consensual arrest in the home.

I rely upon United States versus Martinez-Gonzalez, 686 F.2d 93, Second Circuit 1982.

First this was a grave and violent offense where weapons were threatened with and an important witness was tampered with in the presence of the agents and before, and there was good reason to believe that the defendant was or both defendants were armed in view of the previous talk of weapons and the fact that the Judge here takes judicial notice that dealers of this kind in this borough commonly carry arms.

Third, there was a clear showing of probable cause to make the arrest.

Fourth, there was no doubt that the suspect Jose Crespo was on the premises and Gerardo Crespo shortly appeared.

Five, the entry was effected relatively peacefully and that is the door was neither beaten down nor were there shots fired although the entry was made coercively.

It was made coercively but without violence. The only doubt I have is the question of whether when the agents announced they wanted to question rather than arrest, they had the right to rely upon exigent circumstances.

As I say I believe that it was appropriate in order to reduce violence and the hysterics of a wife rather then to announce at the threshold that an arrest was being undertaken, to announce that they merely wanted to talk to the defendant. They clearly had the intention I believe of arresting at this point as indicated by their subsequent action.

Any further findings of fact or law that the government wants and that —

MR. GERBER: No your Honor.

THE COURT: That the defendant wants?

STONE: So for all practical purposes then you deny the defendant's motion to suppress?

THE COURT: It will be, unless you give me further findings of fact and law that will modify my prospective conclusion.

MR. STONE: It would be my position, your Honor, that once the —

THE COURT: Well, are there any other findings of fact or law that you want to give me?

MR. STONE: Yes, I would ask for a finding of both in fact and law that once the agents were in the apartment and once they were there on a coercive situation that consent as a matter of fact and law could not then be subsequently given.

THE COURT: To the searching of the apartment?

MR. STONE: To the searching of the apartment, yes.

THE COURT: I don't agree with that. I understand your position, but just a few minutes had passed from the entry to the consent to the search and having observed this defendant I believe as I say that he is a self-possessed arrogant person who was not overwhelmed himself.

MR. STONE: I think that Secador versus Postan (ph) that was cited indicated that these type of structured situations negated consent. I think once they came in and they submitted to the authority of the agents which the Court found that they did, they can't then calm them down and get a subsequent consent I think consent has to be given from the beginning and a search has to be good from the beginning and doesn't change character from its success.

I quote for that proposition U.S. versus Diere, I believe it's 301 U.S., but I don't know the citation.

THE COURT: The search didn't begin I find until after they had gotten consent from this defendant and he at that point thought he was going to mislead them and try to mislead them as to what had transpired between himself and the witness both in their presence and earlier and I believe he continued to mislead them.

MR. STONE: My position is that if four agents surround you and you are in handcuffs and they came into the apartment causing a situation which is distressful and is creating a hysterical situation from a co-resident of the apartment that is already submitting to lawful authority and anything that would come afterwards would not be a lawful and valid consent. It is a consent I submit on the factual situation here only because of the lawful authority that was exercised over this period and over this person in

his apartment and he was no longer at that point a threat and he was handcuffed and he was in the apartment. I believe there is one mistake in fact and that is the agents did not cover the back of the apartment to avoid a mistake, and I think that was testimony here that one agent went around the back to present anyone from leaving the apartment.

THE COURT: Was that in there?

MR. GERBER: I believe that it was.

THE COURT: Withdraw that finding.

MR. STONE: I believe that indicates that there was overwhelming submission to authority and I think once they submitted to the authority I don't think that that can change a character.

THE COURT: Well, they were dealing with people that they thought were highly dangerous and one agent around the back if the brother was there and they were equipped with shotguns and pistols but they would not have been able to prevent their escape. I mean some of the agents we know get shot under these circumstances and we were dealing with substantial cocaine dealers in that area and it can be very dangerous — extremely dangerous, so I think it was wise for them to go in immediately and arrest him.

Thereafter I don't believe he was overwhelmed, I think he was still bracing it out.

There was very little for him to gain by failing to give his consent and he must have known that they could have just secured the apartment and gotten a warrant at that stage. This would have delayed this search for an hour or so but it wouldn't have prevented the search. The defendant is a highly intelligent person and he probably was aware of that being a professional in the trade, and there

was no reason for him not to grant the consent. Given these findings of fact and law the motion to suppress the cocaine seizure is denied, and the motion to suppress the paraphernalia is denied.

The motion to suppress the statements of the defendant is denied.

Is there anything further?

MR. STONE: I certainly would like to speak to the U.S. Attorney for a minute please.

THE COURT: Why don't you talk about it and you may want to take a conditional plea if you work that out, I don't care.

MR. STONE: That is what we wanted to do your Honor.

THE COURT: It is an interesting factual set of circumstances and the Court of Appeals may want to rethink the rule as laid down in Martinez-Gonzales, but I believe under that case that this decision is fully justified.

All right we will take a recess for ten minutes please.

(Recess taken.)

THE COURT: I understand the defendants have offered to plead to one count?

MR. STONE: The defendant Jose Crespo has offered to plead guilty to one count of the indictment your Honor, and that is I believe Count —

THE COURT: Is that a 20 year count?

I understand the government doesn't want it though.

MR. GERBER: The government has to go to trial against the ..... (not legible) ..... was to go to trial against both of them.

MR. STONE: It is offered unconditionally.

THE COURT: The government is entitled to do it I guess.

The government has great resources and so has I suppose the Court and we can try cases anytime the government wants to try them.

Are you prepared now because we have the jury selected here.

MR. GERBER: The jury has been selected.

THE COURT: Are you prepared to go today?

MR. STONE: Yes, I would like to go this afternoon because as I indicated to your clerk and to Mr. Gerber that I had to be in Florida on Thursday and I made a long-standing commitment.

THE COURT: It's a one day case?

MR. GERBER: The government is not prepared to go this afternoon, we spoke to the clerk.

THE COURT: Tomorrow at 9:30 the jury will be here at 9:30.

MR. STONE: Yes sir.

THE COURT: Okay, thank you very much.

MR. STONE: You wouldn't consider postponing this case until December 10th would you?

THE COURT: I can't.

(Whereupon this case was adjourned as above set forth.)

* * * *

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

Official Court Reporter
U.S. District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 188 — August Term, 1987

(Argued September 22, 1987
Decided November 25, 1987)

Docket No. 87-1204

UNITED STATES OF AMERICA,
Appellee,

v.

JOSE CRESPO,
Appellant.

Filed: November 25, 1987 Elaine B. Goldsmith, Clerk

Before LUMBARD, OAKES, and KEARSE, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Chief Judge*, convicting appellant of conspiracy to possess cocaine, possession of cocaine with intent to distribute, and intimidating and threatening a federal informant. *Held*, (1) commission of a crime in the presence of Drug Enforcement agents, together with other "exigent circumstances," justified warrantless arrest of appellant in his home; and (2) district court's findings were not clearly erroneous and supported conclusion that appellant's consent to search apartment was knowing and voluntary.

Affirmed.

Joseph I. Stone, New York, NY; David A. Elden, Los Angeles, CA, *for Appellant.*

Charles W. Gerber, Assistant United States Attorney (Andrew J. Maloney, United States Attorney for the

Easter District of New York, Emily Berger, Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

Jose Crespo appeals from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, convicting him after a jury trial of one count of conspiracy to possess cocaine with intent to distribute it, 21 U.S.C. §§ 841(b)(1)(B), 846 (1982), one count of possession of cocaine with intent to distribute it, 21 U.S.C. § 841(a)(1), (b)(1)(B) (1982), and two counts of intimidating and threatening a person to hinder and prevent communication of information relating to a crime to federal law enforcement officers in violation of 18 U.S.C. § 1512(a)(3) (1982). Crespo was sentenced to four concurrent ten-year terms of imprisonment and also sentenced to special parole for life on the possession count. Appeal is from the denial of a pretrial motion to suppress more than five pounds of cocaine, money, and certain drug-related paraphernalia seized from a closet in appellant's apartment in Queens. Crespo challenges the validity of his warrantless arrest, and contends that because his consent to the search was the result of an illegal arrest, it was neither knowing nor voluntary. We affirm.

FACTS

As testified to at the suppression hearing and found by the trial judge who denied appellant's motion, Maria Polkowski was working as an informant for the United States Drug Enforcement Administration ("DEA") in February, 1986, when appellant Jose Crespo and his brother Gerardo made arrangments to sell her three kilograms of cocaine. The sale did not go through. In July and again in late September, 1986, Joe Crespo and his brother, having become aware that Polkowski worked as

an informant, threatened her and her children at gunpoint. At this time Polkowski knew neither Crespo's address nor even his last name. After the September threat she discovered that Crespo — whom she knew only as "Jose" — lived on the second floor of an apartment building located at 85-05 35th Avenue, Queens, New York.

About 6:00 p.m. on October 1, 1986, four DEA special agents, Spanish-speaking Agent Garcia and Agents Hunt, Geisel, and Grabowski, accompanied the informant Polkowski to the Queens address. Garcia instructed her to knock on all of the doors on the second floor and, if "Jose" answered the door, to ask him why he had been threatening her. The agents concealed themselves on the stairwells and around the corner of the hallway some twenty-five to thirty feet from the door of what they later learned was Crespo's apartment.

When Polkowski knocked on the third door, Jose Crespo appeared. Polkowski asked him, "Why are you threatening me? I want you to stop threatening me." In Crespo's response in Spanish, overheard and understood by Agent Garcia, he mentioned the word "killers," and then said, "I have nothing to do with you, but my people will deal with you." As the trial court found, this was a clear threat, if not of immediate physical violence, then of violence in the very near future. At that point the agents had reason to believe that a crime had been committed within their presence under what the trial court termed a "variety of state provisions and probably under 18 U.S.C. § 1512." The federal statute prohibits, inter alia, tampering with a witness or an informant by intentional harassment or threat to dissuade the person from reporting matters to law enforcement officers.[1] The trial judge found that upon

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[1] 18 U.S.C. 1512(a)(3) provided at the time of the entry:

hearing the threats, the agents had the immediate right to arrest Crespo.

As the agents approached, Crespo either slammed the door shut when he saw them or already had closed the door and retreated into his apartment. The agents then knocked on the door and identified themselves as police. Although the agents claimed they merely had their hands on their holstered guns, the court credited the testimony of appellant and his wife, Diana Jiminez, that looking through the peephole in the door, they saw guns in the agents' hands. The court found that this display of weapons, together with the agents' kicking the door, caused the door to be opened by threat of force and not with consent. Nonetheless, because the officers had the immediate right to arrest Crespo, the court held they also had the right to follow him in hot pursuit into the apartment. To have required the agents to get a warrant under the circumstances, particularly where there was a possibility of Crespo's escaping, would have been, the court found, unreasonable.

Once the agents entered the apartment (it is unclear whether Crespo or Jiminez opened the door), Crespo was arrested, handcuffed and given *Miranda* warnings. Shortly after the agents' entry, Polkowski, followed

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(a) Whoever knowingly uses intimidation or physical force, or threatens another person or attempts to do so, or engages in misleading conduct toward another person, with intent to —

* * *

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

closely by Jose's brother Gerardo, also came into the apartment. Polkowski then identified Gerardo as the other man who had threatened her and her children, at which point the agents arrested him and advised him of his rights.

The agents next asked Jose Crespo whether he had any guns in the apartment. The trial court found that, following his denial, Crespo voluntarily and in full control of his faculties consented to a search of the premises, as did Jiminez. Within a minute or so, Special Agent Geisel discovered a black nylon bag on the top shelf of the living room closet. When opened, the bag was found to contain five and one-half pounds of cocaine, $1,800 in cash, numerous plastic bags, a triple-beam balance scale, and a white pad containing drug records. The agents next searched Jiminez's pocketbook and found in it twenty-eight grams of cocaine, whereupon the agents arrested Jiminez and read her *Miranda* warnings. Crespo immediately claimed all of the cocaine as his own, and protested is wife's innocence.

The court below took care to explain how a finding that Crespo and Jiminez voluntarily consented to a search of the apartment was not inconsistent with the previous finding that they had not given consent for the agents to enter the apartment. The trial judge considered Crespo's demeanor, noting his arrogance and self-assurance, and found it was quite likely that Crespo believed the agents would not find the materials hidden in the closet.

DISCUSSION

The Government argues that Crespo's arrest was actually set in motion in a public place, and accordingly, the agents were permitted to enter his apartment in hot pursuit under *United States v. Santana,* 427 U.S. 38 (1976). Unlike the Supreme Court's finding that

Santana's standing in her doorway "expose [her] to public view, speech, hearing, and touch as if she had been standing completely outside her house," 427 U.S. at 42, here we have no precise finding as to Crespo's position when he spoke to the informant Polkowski. For all that appears, the door to the apartment was at most half-opened and, indeed, even that degree of exposure was induced by the DEA agents who were seeking to flush Crespo out. We agree in substance with *State v. Morse,* 125 N.H. 403, 480 A.2d 183 (1984), that *Payton v. New York,* 445 U.S. 573 (1980), would apply under such circumstances so as to prohibit the entry into the home.

But we also hold, as did the the district court, that this court's decision in *United States v. Martinez-Gonzalez,* 686 F.2d 93, 100-02 (2d Cir. 1982), applies. There we noted that even under *Payton,* entry into a home to make an arrest on probable cause may be justified where exigent circumstances exist. *See also United States v. Reed,* 572 F.2d 412, 424 (2d Cir.), *cert. denied,* 439 U.S. 913 (1978). We also there reaffirmed our adoption of factors enumerated by the District of Columbia Circuit Court of Appeals in *Dorman v. United States,* 435 F.2d 385, 392-93 (D.C. Cir. 1970), as useful guides to determining whether exigent circumstances are present:

> These include (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect "is reasonably believed to be armed"; (3) "a clear showing of probable cause . . . to believe that the suspect committed the crime"; (4) "strong reason to believe that the suspect is in the premises being entered"; (5) "a likelihood that the suspect will escape if not swiftly apprehended"; and (6) the peaceful circumstances of the entry.

Martinez-Gonzalez, 686 F.2d at 100 (quoting *Reed,* 572 F.2d at 424). The presence or absence of any one factor is

not conclusive; rather, the essential question is whether there was "urgent need" that "justif[ied]" the warrantless entry. *Dorman*, 435 F.2d at 391, *quoted in Martinez-Gonzalez*, 686 F.2d at 100; *see also United States v. Martino*, 664 F.2d 860, 878-80 (2d Cir. 1981) (Oakes, J., concurring), *cert. denied*, 458 U.S. 1110 (1982). Here, Crespo's use of the word "killers," when coupled with informant Polkowski's reports of Jose's and Gerardo's previous threats at gunpoint, satisfied the first three factors mentioned above. Intimidation of a federal informant is a serious offense, *see* 18 U.S.C. § 1512(a)(3) (1982), subjecting an offender to a fine of not more than $250,000 or imprisonment of not more than ten years, or both. Moreover, Crespo's prior use of guns made it reasonable to believe he was either armed when he answered Polkowski's knock, or that he would arm himself immediately upon retreating into his apartment. As to the third factor, because he committed the crime in their presence, the agents had probable cause to arrest Crespo. And, since they had observed his retreat, the agents could be virtually certain that Crespo was in the premises being entered. Finally, the district court found that there was a significant danger of Crespo's escaping if not immediately apprehended. Even though an agent had been sent to cover the back of the building, there was reason to believe that he alone could not have prevented Crespo's escape, particularly if, as the trial court noted, "the brother was there and they were equipped with shotguns and pistols," as they had been when they previously threatened Polkowski. We often have taken judicial notice that, to substantial dealers in narcotics, firearms are as much tools of the trade as are the commonly recognized articles of narcotics paraphernalia. *Martinez-Gonzalez*, 686 F.2d at 101 (quoting *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977) (quoting *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir.), *cert. denied*, 429 U.S. 820(1976))).

It is true that in *Martinez-Gonzalez* the *Santana* hot pursuit rationale supported the Government's entry into the apartment, 686 F.2d at 101-02, although here we do not rely on that theory. But we take it, as did Judge Leventhal in *Dorman*, 435 F.2d at 391, that the "term [hot pursuit] is not a limitation but rather an illustration of the kind of exigent circumstance justifying entry without a warrant to arrest a suspect." *See also Martinez-Gonzalez*, 686 F.2d at 102. Here, while there was technically no flight from a public to a private place so as to bring *Santana* into play, there was a crime committed in the presence of the agents, together with other distinct exigencies.

First, while this apartment — unlike that in *Martinez-Gonzalez* — was not known as a stash-pad, the agents could well have considered that the probabilities of finding narcotics there were substantial. Having identified themselves to Crespo as police officers, the agents could then reasonably conclude that evidence might be destroyed if they did not enter the apartment swiftly. *See United States v. Gomez*, 633 F.2d 999, 1008 (2d Cir. 1980), *cert. denied*, 450 U.S. 994 (1981). Indeed, the likelihood that evidence would be destroyed was increased just by Polkowski's appearance at the apartment. Crespo already believed Polkowski to be a federal informant; her arrival at his door confirmed the discovery of both his identity and his address, information which Crespo logically could assume would be passed on immediately to the Government. Although we would be hesitant to hold that exigent circumstances sufficient to justify a warrantless arrest in the home exist whenever law enforcement officials make a narcotics suspect aware of their presence and intent to enter that home, our conclusion here is supported by more compelling evidence of the urgent need to make such an arrest.

The agents were aware that they were exposing Polkowski to considerable danger in using her to discover where Crespo lived. Against the background of the earlier reports of armed threats, the threat overheard by the agents made it reasonable to conclude that both the informant and the agents themselves would be subjected to an unacceptable degree of risk if Crespo were not arrested on the spot. Besides affording Crespo an opportunity to arm himself more heavily, any delay in apprehending Crespo could have allowed him to signal his brother or his purported "people" — any of whom might have been inside the apartment at the time — to come to his aid, or even to carry out the death threat against Polkowski's children.

The district court's factual findings preclude Crespo's arguments concerning the voluntariness of his consent to search the apartment. That Crespo was under arrest and in custody, or even handcuffed, does not as a matter of law require a finding of coercion. *United States v. Watson*, 423 U.S. 411, 424 (1976); *Gomez*, 633 F.2d at 1008. Nor under *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), does the Government have an affirmative duty to advise a suspect that he may refuse his consent to an apartment search. Giving the district court's findings the requisite deference, we affirm. While Crespo argues that any consent given was obviously a reaction to the officers' display of authority, we must view the evidence in the light most favorable to the Government, *United States v. Ceballos*, 812 F.2d 42, 51 (2d Cir. 1987). Viewed in that light, we cannot say that findings are clearly erroneous. *United States v. Mast*, 735 F.2d 745, 749, (2d Cir. 1984). On this point, we cannot disregard the trial judge's findings that "having observed Jose Crespo, I believe he is arrogant and self-assured and that it is quite likely that he believed that the agents would not find the materials which were in a closet on a shelf hidden in a bag." There were also

findings to the effect that Crespo was a "highly intelligent person and a professional in the trade," who, therefore, would realize that failure to give consent would merely delay the search for an hour or so. The district court also found that Jiminez consented "not because of a fear of the agents, but rather because her husband had in fact already consented."

Judgment affirmed.

APPENDIX C

Title 18 U.S.C. § 1512 provides as follows:

(a) (1) Whoever kills or attempts to kill another person with intent to —

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is —

(A) in the case of a killing, the punishment provided in sections 1111 and 1112 of this title; and

(B) in the case of an attempt, imprisonment for not more than twenty years.

(b) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to —

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to —

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from —

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or

instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section —

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(f) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance —

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction over an offense under this section.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 25, 1988, I served the within Petition for Writ of Certiorari in re: "Jose Crespo vs. United States of America" in the United States Supreme Court, October Term 1987, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

The Honorable Jack B. Weinstein
United States District Court Judge
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201 (1)

Charles Gerber
Assistant United States Attorney
225 Cadman Plaza West
Brooklyn, New York 11201 (1)

Solicitor General
Department of Justice
Washington, D.C. 20530

All Parties to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on January 25, 1988, at Los Angeles, California

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